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In The

Supreme Court of the United States

October Term, 1964

No. [redacted] 106

FAIR SHARE ORGANIZATION, INC., ET AL,
Petitioners,

VS.

PHILIP NAGDEMAN & SONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF INDIANA

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF INDIANA

Petitioners, Fair Share Organization, an Indiana corporation, Roosevelt V. Haywood, William Robinson, Mack King, John Upshaw, Mack Flagg, and James Walker, individually and jointly, pray that a writ of certiorari issue to review the judgment of the Appellate Court of Indiana, which affirmed a lower court judgment for a permanent injunction and $70,000.00 in damages on October 22, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Appellate Court (R.XV) printed in Appendix A hereto, infra, p. 1a, is reported in

2 I.D. 234, 193 N. E. 2nd 257. The opinion of the Supreme Court in a companion decision (R. XXXII) on an original writ of mandamus, printed in Appendix B hereto, infra, p. 6a, is reported in 1 I. D. 509, 191 N. E. 2nd 1.

JURISDICTION

The judgment of the Appellate Court of Indiana was entered on October 22, 1963, (R. XV), p. 1a, infra. Rehearing was denied on November 18, 1963, (R. XX). Petition to transfer to the Supreme Court of Indiana was denied on February 25, 1964, (R. XXVII). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254, (3), which rights involved the 14th Amendment of the United States Constitution was raised by the pleading in the lower court, (R. 35) to wit: "That the acts sought to be enjoined are the exercise of defendants' constitutional rights of freedom of speech guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and by Article 1, Sections 9 and 31 of the State of Indiana."

The question of petitioner's constitutional rights was first brought to the attention of the Supreme Court of Indiana on April 5, 1963, in a "Verified Petition for Writ of Mandate", seeking an alternative writ of mandate to compel the respondent court to enter special findings of fact and conclusions of law in compliance with Section 40-506 through 40-509 of the Anti-Injunction Statutes, Burns' Indiana Statutes, Vol. 8, part 1, and/or in the alternative to require the court to set a $10,000.00 bond to be posted by plaintiff (R. XXXII-XXXIV).

The constitutional question, which was not specifically mentioned in the assignment of errors due to good faith reliance on prior Supreme and Appellate Court decisions, was again urged in the petition for a rehearing before the Appellate Court, (R. XX), and

petition to transfer before the Supreme Court of Indiana, (R.XXIV). Although the assignment of errors raised the lack of jurisdiction for failure of the trial court to enter special findings of fact in compliance with expressed provisions of the statute, the Appellate Court affirmed the judgment for failure to file a motion for a new trial, with a footnote: (1)

> (1) "We are unable to agree that the unique state of facts set forth in the briefs in the instant case constitutes a labor dispute under our Anti-Injunction Statute in Indiana, Section40-501, et seq. Burns' 1952 Replacement. Contrariwise, we would suggest that the said alleged facts in this case may involve civil rights and constitutional questions." Appendix A, infra, p. 5a.

The constitutional question was ignored in the Newton Circuit Court, Appellate Court, and Supreme Court of Indiana, although raised in the trial court and briefed on appeal. (Appendix C, infra, p. 11a).

QUESTIONS PRESENTED

1. Whether There Were Constitutional Questions Arising On The Record Concerning The Violations of Free Speech Guaranteed By The Fourteenth Amendment, Which Were Preserved For Appellate Review, Necessary To The Decision Of The Appeal.
2. Whether A Labor Dispute Was Involved.

CONSTITUTIONAL AMENDMENT INVOLVED

The constitutional amendment is the 14th, Section 1. It is printed in Appendix D, p. 13a.

STATUTE INVOLVED

The statutory provisions involved are Sections 40-501 — 40-514 of the Indiana Anti-Injunction Statute, which pertinent sections are printed in Appendix E—, infra, p. 15a.

STATEMENT OF FACTS

The facts are in substance that Respondent, an Indiana corporation, was organized in 1950 to sell men's clothing in East Chicago, Indiana. Prior to June 4, 1962, Respondent employed 4 salesmen, two seamstresses, a bookkeeper, and a window washer. Historically, the employees had been Caucasians except a Negro seamstress and window washer. Manuel Allande, a Caucasian of Spanish descent, was employed as a salesman on August 20, 1962. (R. 391, l. 18).

Petitioner Fair Share Organization, Inc. was formed on May 11, 1959, as a non-profit Indiana corporation for the purpose of obtaining political, economic, social, and civic equality through lawful means, and to awaken the masses of Negroes to their potentials through collective action. Funds were raised through promotional activities with the issuance of membersip cards. Petitioners Roosevelt V. Haywood, William Robinson, Mack King, John Upshaw, Mack Flagg, and James Walker, are officers and members of the Fair Share Organization.

On or about the 14th day of February, 1962, members of the Fair Share Organization demanded that the Respondent employ a Negro salesman (R. 356-A).

Upon Respondent's refusal, Petitioners commenced picketing, using approximately 25 pickets per day, each working for a period of time from a half hour to 45 minutes per picket, commencing June 4, 1962. No monies were paid to the pickets, but food and coffee were made available in trucks.

When cold weather came, picketing ceased, and trucks plus automobiles with signs were parked in metered zones. The pickets photographed some prospective customers of Negro descent and halted them for conversational purposes.

The Petitioners exhibited the following signs:

1. **"Americans Help Us To Blockade Nagdemans"**
2. **"Join The Fair Share Organization, Help Fight Communism"**
3. **"Decent Americans, Help Us To Stamp Out Unlawful Discriminatory Hiring Policies"**
4. **"Don't Spend Your Money Where You Can't Work As A Salesman"**
5. **"Nagdeman Brothers Have Threatened To Destroy F. S. O."**
6. **"Pass By, Don't Buy Discrimination".**
7. **"Join The Fair Share Organization, Help Fight Communism".**
8. **"Join The Fair Share Crusade For Equality".**
9. **"Negroes Qualified To Do More Than Scrub Floors, Wash Windows, Cook and Sew"**
10. **"No Negro Salesman For 50 Years".**
11. **"After 147 Days Of Walking — We Continue To Boycott Nagdeman Brothers" (R. 136)**
12. **Americans, Help Us To Change Unfair Hiring Policies (R. 268)**

There was no proof of fraud or violence, threats, intimidation, (R.205,l.-l.16) attempt to negotiate,(R. 407, l. 1 and 239, l. 4-9) or that the Petitioner organization had either participated in or authorized any illegal conduct after knowledge thereof.

Pursuant to June 4, 1962, Respondent placed 25 weekly ads in the Gary Post Tribune and Hammond Times, newspapers of general circulation, concerning the dispute, which is illustrated by the following ad appearing on July 27, 1962:

"IF NEGROES REALLY WANT
FAIR SHARE
PERHAPS IT'S TIME THEY GOT IT !

"County Welfare records show that 78.8% of A.D.C. go to Negroes.

We leave it to you, Mr and Mrs. John Q. Taxpayer, —don't you think it's about time that Negro Fair Share Organization picked up the tab for their 78.8%?

Isn't this Fair Share?

Perhaps it's time we stopped being squeamished about this issue — Fair Share is a TWO-WAY STREET.

As long as the Negro Fair Share Organization issues ultimatiums demanding PERCENTAGE-WISE EQUALITY, maybe the time is here for a BOSTON TEA PARTY — 1962 version.

Is a minority going to rule? Is everyone else being taxed without their FAIR SHARE of representation and benefits?

The Negro Fair Share Organization DEMANDS THAT WE HIRE A NEGRO salesman as it claims we have a large percentage of Negro patrons.

As we do only 14% of our gross business with Negro people, right now we are really OVER-STAFFED with Negro help.
Negroes represent 22% of our staff.

WHAT IS FAIR SHARE ?

Use Your Convenient
Nagdeman's Charge
account

Shore Line Buses
to our Door

NAGDEMAN'S
For Men and Boys

Store Hours: 9:00 to 5:30 Michigan at Fir
Indiana Harbor" (R. 356 B)

On the 11th day of August, 1962, Respondent filed its verified complaint for injunctive relief and damages, alleging unlawful picketing of their clothing store.

The Petitioners filed answer on the 17th day of August, 1962, which omitting irrelevant parts, stated that the acts sought to be enjoined are the exercise of defendants' constitutional rights of freedom of speech guaranteed to them by the 14th Amendment to the Constitution of the United States and by Article 1, Sections 9 and 31 of the Constitution of the State of Indiana. (R. XXXII).

The lower court entered its special findings of fact, conclusions of law, and judgment on the 21st day of March, 1963. (R.48) Appendix F, infra, p. 19a).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE GRAVE CONSTITUTIONAL QUESTIONS ARISING ON THE RECORD, WHICH WERE PRESERVED FOR APPELLATE REVIEW, NECESSARY TO THE DECISION OF THE APPEAL AND APPLICATION FOR WRIT OF MANDAMUS.

The decisions of the court below in the instant case and in State ex rel. Fair Share Organization v. Newton Circuit Court, 1 Ind. Dec. 509, 191 N. E. 2nd 1, (Appendix B—, infra, p. 6a, on which anthority the instant case was decided, are directly in conflict with the decision of the Supreme Court of Indiana in State ex rel. Latham v Spencer Circuit Court, decided December 16, 1963, 2 Ind. Dec. 416, 194 N. E. 2nd 606, and unfair, which dissenting opinion was written by Justice Jackson who wrote the majority opinion in State ex rel. Fair Organization v. Newton Circuit Court. The following language is found in 2 Ind Dec. 429, at the bottom of the page:

" * * * The majority opinion in the case at bar represents a radical departure from the usual procedure in original actions, and the conclusions reached therein as to the factual and legal situation as it existed in the respondent court is not supported by the record brought to this court. To arrive at the conclusions drawn by the majority opinion, it is necessary to accept at face value relator's statements in the court below and in the original action, and to disregard the record before us, as well as to substitute our judgment guess or whim in place of the judicial determination of the trial court (respondent) court adverse to the contentions of the relator. (1). **As previously stated in this dissent, this is an original action and not an appeal. The majority opinion is erroneous, is bad law, and will, and should haunt this court.** * * *

* (1) State ex rel. Fair Share Organization v. Newton Circuit Court.

(Petitioner's Emphasis)

This radical departure from the usual procedure where constitutional questions are involved is manifested in Elder V. Dowd, Warden, et al, (1954), 233 Ind. 256, where the appellee filed a motion to dismiss the appeal for failure to file a motion for a new trial, in which the court held:

" * * * In habeas corpus proceedings it has been the practice in this state to file motions for a new trial when the defendant suffers an adverse decision. See Scott V. Scott, 1949, 186, 91 N. E. 2nd 176."

" * * * However, this court did acquire jurisdiction of the appeal when the transcript and assignment of errors was filed with the clerk of this Court Rule 2-2. Appellant asserts he was denied rights under the Indiana Constitution and for

this reason we will consider his appeal on the merits. Lobaugh v. State (1943), 222 Ind. 63, 51 See: NAACP v. Alabama, 1958, 357 U. S. 449.

In September, 1960, Supreme Court Rule 2-6 became effective. This Rule causes confusion as to what is appropriate. Pursuant to September, 1960, effective date of Supreme Court Rule 2-6, Superior Trailor Manfacturing Corp, v. J. W. Scadderday. — Ind. —, 169 N. E. 2nd 721, November 3, 1960, Wyatt v. Wyatt, 1960, — Ind. App. —, 165 N. E. 2nd 768, Sykes v. Lefton, 1960, 130 Ind.App. 620, Harshman et al v. Sanderson, — App, —,July 2, 1963, 1 Ind. Dec. 632, and Triplett v. Triplett, decided November 12, 1963, 2 I.D. 312, 193 N. E. 2nd 662, were decided and in each instance independent assignments were made concerning conclusions of law, and the provision that an assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal has been previously disregarded.

A preservation of constitutional questions by the pleadings and brief was discussed in Thompson, et al v. Travers, et al, 1940, 220 Ind. 1, and although City of East Chicago & Calumet Dist. Transit Co., decided April 8, 1963, made reference to the non-assignment of a constitutional question in the motion for a new trial, the following language is found on page 248, 1 Ind. 248, line 3:

> " * * * Courts will pass upon the merits of a case if they can do so without determining a constitutional question. In re Mertes Estate, (1914), 181 Ind. 478, 104 N. E. 753, Henderson, Auditor v. State, ex rel. Stout Sheriff, 1894, 137 Ind. 552, 36 N. E. 257. **Furthermore, having failed to discuss the question in its brief, appellant has waived any consideration of it.** Lewis v. Albertson, 1898, 152 Ind. 693, 49 N. E. 34; Supreme Court Rule 2-17 (e) and (f).

(Petitioner's Emphasis)

Since failing to discuss the constitutional question of free speech and association in either state ex rel. Fair Share, decided June 14, 1963, or the instant case, the courts of Indiana in State ex rel. Old Writers, Inc. v. Walter Beli, Judge, Superior Court of Marion County, January 27, 1964, 2 I. D.. 606 and State ex rel. Blake v. Madison Circuit Court, October 21, 1963, 2 Ind. Dec. 230, 193 N. E. 2nd 251, examined constitutional questions although no assignment was involved.

In the Blake case, which rationale is particularly significant, the court on page 232, 2 Ind. Dec., line 33 held:

> (2) "The decree as entered purported to adjudicate that Ordinance No. 2345, passed by the Anderson Common council and approved by the mayor on June 18, 1957, is void and is unconstitutional. **The jurisdiction of the respondent court is prescribed by the legislature."** See: 40-501 — 40-509 (Appendix E—, p. 15a).

(Petitioner's Emphasis)

> "Respondent had no jurisdiction to enter such a decree which fully would determine the primary issue in the case, except upon notice to the parties defendant and the subsequent procedure required in the due course of law, none of which procedural requirements were followed by the court. The judgment was a nullity." See: Blackmon v. Koehler, 1957, 127 App. 397, 140 N. E. 2nd 763, and State ex rel. Taylor, et al v. Circuit Court of Marion County, 1959, 240 Ind. 94, 162 N. E. 2nd 90."

In affirming the lower court's judgment, the Appellate Court cited, inter alia, Bays v. State of Indiana, 1959, 240 Ind. 37, 159 N. E. 2nd 393, cert. denied 361 U. S. 972, (Appendix A), which is distinguishable from the instant case in that no application for a writ of mandamus was involved, and no Supreme Court Rule

2-35 (Appendix D), infra, p. 13a, had been invoked in the trial court, which reasoning for its existence is similar to the language employed in the instant case for a motion for a new trial.

> " * * * We have stated previously that there is substantial merit in the requirement provided in Rule 2-35. The trial court should be fully appraised of the contention of the relator that it has exceeded it jurisdiction before a complaining party comes to this court for relief." State ex rel. Brennan v. Superior Court, etc. (1960), 240 Ind. 446, 166 N. E. 2nd 336. See: State ex. rel. Keener v. Noble Circuit Court, decided Jan. 28, 1963, I. D. 34, 187 N. E. 2nd 365."

The Appellate Court decision would require Petitioners to submit their complaint of a deprivation of constitutional rights both under Supreme Court Rule 2-35 and Rule 2-6, which would not afford immediate relief due to the fact that there is no limitation on when the trial court shall rule on a motion for a new trial. See: Korshot v. Leevy, 178 N. E. 2nd 750.

Further, the decisions below are in conflict with prior decisions of this Court, which have recognized that freedom of association and speech are protected against "regulatory measures which, no matter how sophisticated, cannot be employed in purpose or effect to stifle, penalize or curb the exercise of First Amendment rights." NAACP v. Louisiana, 366 U. S. 293,296; American Communications Ass'n v. Douds, 339 U. S. 382; United States v. Rumely, 345 U. S. 41; Shelton v. Tucker, 364 U. S. 479; Bates v. Little Rock, 361 U. S. 516.

Finally, the action of the courts below in refusing to decide the constitutional questions expeditiously raised by the pleadings, petitions for transfers, petition for rehearing, and brief was within itself a denial of constitutional rights. See: Dorchy v. Kansas, 272

U. S. 306, 308-309; Erie R. Co. v. Purdy, 185 U. S. 148, 154; Dewey v. Des Moines, 172 U. S. 193, 199; Roby v. Colehour, 146 U. S. 153, 159-160.

II.

A LABOR DISPUTE IS INVOLVED WHICH REQUIRES STRICT COMPLIANCE AS A PREREQUISITE TO JURISDICTION UNDER THE INDIANA ANTI-INJUNCTION STATUTE

Clearly, the question presented of whether a labor dispute is involved is of importance to Negroes in future petitioning for redress of grievances and economic disputes.

The decision of the court below is further believed to be erroneous, which language adopted by the Supreme Court of Indiana in its refusal to permit a transfer on the constitutional questions involved created confusion:

> " * * * Therefore, appellants' assignment of error present no justiciable question to this court and the judgment of the trial court is affirmed. (1) (1) "We are unable to agree that the unique state of facts set forth in the briefs in the instant case constitutes a labor dispute under our Anti-Injunction Statute in Indiana. Section 40-501 et seq. Burns' 1952 Replacement. Contrariwise, we would suggest that the said alleged facts in this case may involve civil rights and constitutional questions."

The court's reasoning, which would seem to justify and explain the failure to determine the jurisdictional questions raised in the assignment of errors, is in conflict with the following decisions:

> Fair Share Organization v. Kroeger Company, 1960, 240 Ind. 461, 165 N. E. 2nd 606 (Appendix G, p. 27a).

New Negro Alliance, et al, 1938, 303 U. S. 552

In NAACP v. Burton, 1963, 83 Sup. Ct. 328, U. S. 415, 9 L. ed. 405, at page 430, the wisdom of Mr. Justice Harlan is particularly significant :

> " * * * An analogy may be drawn between the present case and the rights of workmen in labor disputes. At the heart of these rights are those of a laborer or a labor representative to speak; to inform the public of his disputes and to urge his fellow workers to join together for mutual aid and protection. So important are these particular rights that absent a clear and present danger of the gravest evil, the state is not only without power to impose a blanket prohibition on their exercise, Thornhill v. Alabama, 310 U. S. 88 L. ed. 1093, 60 Sup. Ct. 736, but also may not place any significant obstacle in their path. Thomas v. Collins, 324 U. S. 516, 89 L. ed. 430, 65 Sup. Ct. 315."

The decision in the instant case is further erroneous for the reason that there was no strict compliance with the Anti-Injunction Statute as to special findings of facts (Appendix F, infra, p. 19a), and no attempt to negotiate the issue of employing a Negro salesman. See: General Electric Company v. Gojack, 68 Fed. Supp. 686.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Hilbert L. Bradley and
Charles P. Howard, Jr.

Counsels for Petitioners

APPENDIX A

FAIR SHARE ORGANIZATION, INC., ROOSEVELT V. HAYWOOD, WILLIAM ROBINSON, MACK KING, JOHN UPSHAW, MACK FLAGG, AND JAMES WALKER V. PHILIP NAGDEMAN & SONS, INC.

APPELLATE COURT OF INDIANA

No. 20018

APPEAL FROM NEWTON CIRCUIT COURT

ON MOTION TO AFFIRM OR DISMISS

APPEARANCES: Hilbert L. Bradley, Gary, Indiana, for Appellants.

John L. Podreskey, Owen W. Crumpacker, Richard P. Komyatte, Crumpacker, Burbach & Abrahamson, Hammond, Indiana, for Appellee.

PER CURIAM

This is an appeal from a judgment in the Newton Circuit Court whereby appellants were permanently enjoined, on March 21, 1963, from picketing the premises of appellee's place of business.

The record discloses that appellee, Philip Nagdeman & Sons, Inc., filed its complaint seeking injunction on August 11, 1962. Appellants, on August 17, 1962, entered a general appearance and filed an answer. The cause was then venued to Newton County from Lake County. The cause was tried before the court without the intervention of a jury. On March 21, 1963, the trial court entered its findings of facts and conclusions of law; and thereupon, the court entered judgment in favor of appellee.

The record shows that appellants did not file a motion for new trial with the trial court. Appellants

instead instituted this appeal by filing an assignment of errors which, omitting the formal parts is as follows:

"1 The court erred in granting a permanent injunction of March 21, 1963.

2. The court erred in failing to enter of record special findings of fact as a condition precedent to granting the permanent injunction, as provided by the Anti-Injunction Statutes, Section 40-507.

3. The court erred in failing to enter of record special findings of fact that the appellant corporation either participated in, actually authorized, or ratified after actual knowledge, any unlawful acts of individual officers, members or agents, as provided by the Anti-Injunction Statutes, Sections 40-506 — 40-507.

4. The court erred in failing to enter of record special findings of fact that appellee complied with all obligations imposed by law involved in the labor dispute, or made every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration, as provided by the Anti-Injunction Statute, Section 40-508.

5. The court erred in its conclusion of law No. 1.

6. The court erred in its conclusion of law No. 2.

7. The court erred in its conclusion of law No. 3."

Appellee urges, in a motion to dismiss or, in the alternative, to affirm, that no motion for new trial was filed, no question is presented in this appeal.

With this contention we must agree. See Lepsch v. Marlow (1963), — Ind. App.—, 189 N. E. 2d 116 (1 Ind. Dec. 225) *; Summers v. Summers (1961), —Ind. App.—, 178 N. E. 2d 69. State (ex rel. Foster) v. Swarts and Others (1875), 9 Ind. 221; B. C. Pearsall Butter Company v. Gibson, et al (1922), 78 Ind. App. 308, 135 N. E. 492.

Supreme Court Rule 2-6 provides, in part, as follows:

"In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing of such motion, and an assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently. Adopted as amended June 28, 1960. Effective September 1, 1960, and shall apply only to cases filed on or after such effective date."

Appellants contend, however, that alleged errors of the trial court in making special findings of fact may be independently assigned as error. We do not agree with this contention. In 1949, Supreme Court Rule 2-6 read, in part, as follows:

"If, in the trial court, a motion for a new trial is filed, each error relied upon, however and whenever arising up to the time of the filing of said motion, may be separately specified therein as a ground therefor, and an assignment of error to the effect that the trial court erred in overruling said motion shall be sufficient to raise said asserted error on appeal. Errors which now must be assigned independently may still be so assigned if desired."(Adopted April 17, 1940. Effective September 2, 1940. Amended and effective November 30, 1949.)

Our Supreme Court, in the case of Bays v. State of Indiana (1959), 240 Ind 37, 159 N. E. 2d 393, cert. denied 361 U. S. 972, in discussing the 1949 Rule, said:

> "Prior to adoption of the above rule it was permissible to independently assign many errors in the proceeding which preceded the filing of a motion for new trial. However, the rule as changed requires that, in all proceedings where a trial is had and a motion for new trial is contemplated, such errors shall be specified as a ground for new trial. The chief reason for requiring that such errors be set forth as causes in a motion for new trial is that the judges have a chance to review the subject matter complained of and correct the error, if any, by granting the motion for new trial prior to appeal. * * * "

Subsequently, the rule announced in the Bays case was incorporated into Rule 2-6 by amendments effective September 1, 1960, as set forth above.

Thus, it is now clear that all errors occurring prior to the time for filing a motion for new trial must be specified as a ground for new trial whenever the motion is appropriate.

However, appellants cite the case of Greenwell v. Cunningham et. al. (1948). 118 Ind App. 251, 76 N. E. 2d 684, and State ex rel. Taylor, et al. v. Circuit Court of Marion County, Niblack, Judge (1959), 240 Ind. 94, 162 N. E. 2d 90, as upholding the contention that a jurisdictional defect may be assigned as independent error.

The Taylor case, supra, involved an original action for writ of mandate and prohibition in the Supreme Court. The writ issued because a restraining order issued by the respondent court was wholly void.

However, the instant case has been before our Supreme Court on a petition for writ of mandate and

the court indicated that the judgment below is not void and merely its correctness or lack of correctness was in issue. See State ex rel. Fair Share Organization, Inc. v. Newton Circuit Court (1963), — Ind. — , 191 N. E. 2d 1 (1 Ind. Dec. 509)*

In Greenwell v. Cunningham, supra, the court indicated by dicta that if a judgment is void through lack of jurisdiction over the subject matter, the legality of the judgment may be assigned as independent error. Appellants, however, do not contend that the judgment is wholly void through lack of jurisdiction over the subject matter. The assigned errors, instead, go to the sufficiency of the findings of fact and errors in conclusions of law. Nor, in light of the Supreme Court decision, do we think the possibility of a wholly void judgment is present. The cases cited by appellants, then, are not applicable.

The errors assigned should have been made grounds for a motion for new trial.

It becomes apparent that appellants have failed to comply with the provisions of said rule.

Therefore, appellants' assignment of error presents no justiciable question to this court and the judgment of the trial court is affirmed. (1)

(1) We are unable to agree that the unique state of facts set forth in the briefs in the instant case constitutes a labor dispute under our Anti-Injunction statute in Indiana. 40-501, et seq. Burns' 1952 Replacement. Contrariwise, we would suggest that the said alleged facts in this case may involve civil rights and constitutional questions.

APPENDIX B

STATE OF INDIANA ex rel. FAIR SHARE ORGANIZATION, INC., ROOSEVELT V. HAYWOOD, WILLIAM ROBINSON, MACK KING, JOHN UPSHAW, MACK FLAGG, and JAMES WALKER v. THE NEWTON CIRCUIT COURT

Supreme Court
of Indiana

No. 30403
June 14, 1963

Original Action

APPEARANCE: Hilbert L. Bradley, Gary, Indiana, for Relators. John L. Podreskey, East Chicago, Indiana, Owen W. Crumpacker, Hammond, Indiana, George V. Burbach, Hammond Indiana, for Respondent.

JACKSON, J.

The relators filed in this Court their "Verified Petition for writ of Mandate" on April 5, 1963, seeking an alternative writ of mandate to compel the respondent court "to enter special findings of fact and conclusions of law in compliance with Section 40-506 through 40-509 of the anti-injunction statutes, Burns' Indiana Statutes, Vol. 8, part 1, and/or in the alternative to require the court to set a bond for $10,000.00 to be posted by plaintiff in said cause entitled Philip Nagdeman & Sons, Inc. vs. Fair Share Organization, Inc. Roosevelt V. Haywood, William Robinson, Mack King, John Upshaw, Mack Flagg, and James Walker, the same being Cause No. 14859 in the said Newton Circuit Court . . . ."

The record before us discloses that on August 11, 1962, Philip Nagdeman & Sons, Inc., filed its complaint in the Lake Circuit Court of Lake County, Indiana, against the Fair Share Organization, Inc., seeking

an injunction. The complaint alleging in substance, that defendant corporation, its officers, agents, employees, members and associates had, inter alia, picketed unlawfully in front of and near the plaintiff's place of business for the purpose of compelling plaintiff to selectively hire Negro personnel on a proportional basis; carrying signs suggesting that the plaintiff discriminates against Negroes in its employment practices and other signs and placards tending to discredit plaintiff, all of which caused a loss of business to the plaintiff. To this complaint relators on August 17, 1962, entered a general appearance and filed their answer in two legal paragraphs, the first by appropriate rhetorical paragraphs of no knowledge, admission and denial; the second being an affirmative answer and by appropriate rhetorical paragraphs challenged the right of the plaintiff to institute or maintain the action by reason of the anti-injunction statutes (Acts 1933, ch. 12, Sections 4-14, p. 28, being Sections 40-504 — 40-514, Burns' 1952 Replacement), then denied the commission of any unlawful acts and finally claimed the acts sought to be enjoined were only the exercise of rights of freedom of speech guaranteed by the State and Federal Constitutions.

On the same day, August 17, 1962, plaintiff requested and obtained a change of venue from the county, the parties struck and the cause was thereby venued to Newton County.

Thereafter, the cause was set for trial and then tried in the respondent court without the intervention of a jury, on November 21, December 5 and 6, 1962. After the introduction of all evidence and after both parties had rested, defendants (relators here) asked for and were granted time to December 17, 1962, to file a written motion for judgment in favor of the defendants. Thereafter , on December 17, 1962, defendants motion with supporting brief was filed, in substance asserting that there was no evidence to justify

the relief sought. On December 18, 1962, defendants below (relators here) submitted their proposed findings of facts and conclusions of law. On March 13, 1963, plaintiff below filed its proposed findings of facts and conclusions of law. On March 21, 1963, both parties having waived oral argument, the court entered its finding of facts and conclusions of law; thereupon, the court entered appropriate judgment in favor of plaintiff. The judgment in pertinent part is as follows:

> "IT IS NOW ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, and any and all persons acting by, through, or at the instance of said defendants, and all persons with knowledge of this decree, are separately and severally permanently enjoined and restrained from:
>
> "(a) Picketing, congregating in front of, or blockading the premises of the plaintiff firm at the southeast corner of Michigan Avenue & Fir Street in East Chicago, Indiana, commonly known as 3409 Michigan Avenue;
>
> "(b) Soliciting, accosting, and/or photographing patrons of the plaintiff company store, and/or in any way attempting to influence or induce said patrons from entering the store; and
>
> "(c) From displaying, exhibiting, posting or in other ways advertising, representing, or inferring to the public by means of signs, cards or other advertising devises that the plaintiff, Philip Nagdeman & Sons, Inc. is engaged in Communistic practices, discriminatory hiring policies, is un-American, or that it either has or will attempt to destroy F. S. O., or any signs or slogans similar to the same.

"IT IS ORDERED, ADJUDGED, AND DECREED FURTHER that the plaintiff have and recover of and from the defendants, and each of them, the sum of

$10,000.00 and that it will recover its costs, taxed at $37.85.

"ALL OF WHICH IS ORDERED, ADJUDGED, AND DECREED by the Court this 21st day of March, 1963."

The case at the bar presents a situation where a complaint was filed, general appearance entered by defendants (relators), followed by the filing of the answer, trial was had, witnesses sworn, evidence heard, then both parties submitted proposed findings of fact and conclusions of law thereon. The court made its findings of fact, stated its conclusions of law, and rendered judgment thereon in favor of plaintiff.

On the record here this Court has no jurisdiction to grant the relief sought in the case at bar.

This court said in State ex rel. Burton v. Gelb (1917), 225 Ind. 330, 333, 334, 75 N. E. 2nd 151, (153) *,

> " * * * A hearing was had on the issues thus presented, resulting in a finding and judgment for the intervenor against the relators herein.
>
> "In this original action we cannot be concerned with the correctness or lack of correctness of the judgment rendered. Judgments are reviewed and errors corrected only on appeal. We are concerned only with ascertaining whether the respondent has failed to perform a clear legal duty, that is absolute and imperative and not dependent on the exercise of discretion or upon judicial determination.
>
> "When the issue was joined in this case and a hearing thereon was had by the respondent court, it became its duty to make its finding and judgment. If it had failed or refused to do so, the performance of this duty could have been compelled by mandate." See also the following cases: State ex rel. Benson v. Superior Court (1933), 205 Ind.

464, 468, 187 N, E. 203, (204) *; State ex rel. Dayton etc. Co. et al v. Board of Comm'rs. of Tippecanoe Co. (1892), 131 Ind.. 90, 93, 30 N. E. 892, (893) *; State ex rel. v. Wrigley, Judge (1918) 187 Ind. 78, 118 N. E. 353; Gregg, Justice of the Peace v. State ex rel. Branch (1898). 151 Ind. 241, 51 N. E. 359; State ex rel. Local Union No. 414 v. Allen C. C. (1960), 240 Ind. 318, 164 N. E. 2d 648; State ex rel. Huebner v. Porter Cir. Ct. (1962), —Ind. —, 185 N. E. 2d 299; State ex rel. Cassel v. Johnston (1933), 204 Ind. 563, 185 N. E. 278; City of Auburn v. State ex rel. (1908), 170 Ind. 511, 83 N. E. 997, (rehearing denied 84 N. E. 990).

The relief sought is not available by way of original action at this stage of the proceedings, and the writ is therefore denied.

Myers, C. J., Achor, Arterburn and Landis, JJ. concur.

APPENDIX C

PETITIONER'S BRIEF

POINT 6

THE RIGHT TO PICKET INVOLVE THE RIGHT OF FREE SPEECH AND ASSEMBLY AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE U S. CONSTITUTION, ARTICLE 1, SECTIONS 9 AND 31 OF THE INDIANA CONSTITUTION

The right to picket involves the right of free speech and assembly. This has long been regarded as a fundamental right guaranteed to citizens of Indiana, which is protected by the Constitution of Indiana, Article 1, Section 9, page 7, providing:

> "No law shall be passed restraining the free interchange of thought and opinion or restricting the right to speak, write, or print freely, on any subject whatever; but for the abuse of that right, every person shall be responsible."

The right to assemble, instruct, and petition is guaranteed by the Constitution of Indiana, Article 1, Section 31, page 68, which provides as follows:

> "No law shall restrain any of the inhabitants of the state from assembling together in peaceable manner, to consult for the common good; nor from instructing their representatives; nor from applying to the general assembly for redress of grievances."

Peaceful dissemination of information and peaceful picketing for a lawful purpose is constitutionally protected and may not be enjoined.

SPICKELMIER V. CHAMBERS, (1943)
113 IND. APP. 470, 47 N. E. 2ND 189

THORNHILL V. STATE OF ALABAMA, (1940)
310 U. S.88, 60 S. CT. 736

MILK WAGON DRIVERS UNION OF CHICAGO ET AL V. MEADOWMOOR DAIRIES, INC. (1941) 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836, 132 A. L. R. 1200

American Federation of Labor et al v. Swing, et al (1941) 312 U. S. 321, 61 S. Ct. 736, 85 L. ed. 855

Davis, et al v. Yates, et al (1941)
218 Ind. 364, 32 N. E. 2nd 86

Dummermuth v. Sykes (1950)
95 N. E. 2nd 52; 57 Ohio L. A. B. S. 481

S. A. Clark Lunch Co. v. Cleveland Waiters and Beverage Dispensers (1926)
154 N. E. 362 (Ohio)

Bakery and Pastry Drivers v. Wohl., 315 U. S. 769

Anderson v. Local 311, (1950), 94 N. E. 2nd 633 (Ohio)

Lubbers v. Hurst (1946) 78 N. E. 2nd 580 (Ohio)

Evans v. Retail Clerks Union No. 977 (1940)
32 N. E. 2nd 51 (Ohio)

New Negro Alliance v. Sanitary Grocery (1938)
92 F. (2nd) 510; 303 U. S. 552; 59 S. Ct. 703

Julie Baking Co. v. Graymound (1934)
274 NYS 250

Bernstein and Retail Cleaners and Dryers Assn., 31 Ohio N. P. N. S. 433

Sydney J. Wood etc. v. John M. O'Grady etc. (1954), 122 N. E. 2nd 386 (N. Y.)

Norman C. Murrin et al v. Cook Bros. Dairy, Inc. (1956) 127 Ind. App. 23, 138 N. E. 2nd 907

APPENDIX D

UNITED STATES AMENDMENT 14

1. CITIZENSHIP – DUE PROCESS OF LAW — EQUAL PROTECTION. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INDIANA SUPREME COURT

2. RULE 2-35 — ORIGINAL ACTIONS FOR WRITS OF MANDATE AND PROHIBITION. — Petitions for writs for mandamus and prohibition out of the Supreme Court and Appellate Court shall be verified and filed in quintuplicate. Except in cases involving a change of venue, no petition for a writ of prohibition will be entertained until the relator has first attacked the want or excess of jurisdiction of the trial court by a written motion, brought to the attention of the judge if filed in vacation, which has been denied or not promptly acted upon. Except in cases involving a change of venue, no petition for an alternative writ of mandamus will be entertained unless it be shown that the duty to act has been presented or brought to the attention of the trial court, or the judge thereof if in vacation. If the relief sought relates to a proceeding in an inferior court certified copies of all pleadings, orders and entries pertaining to the subject matter should be set out in the petition or made exhibits thereto. Petitions shall be accompanied by at least six copies of the appropriate form of the temporary or alternative writ to which the petitioner deems himself to be

entitled, which writ shall command the respondent to show cause on or before a day to be fixed by the court why the writ should not be made permanent, or absolute. (As amended October 18, 1955, effective January 2, 1956; February 11, 1957, effective March 1, 1957.) (An amendment to this rule requiring six copies, Effective June 1, 1963, appears in the Special Session Pamphlet.)

APPENDIX F

BURNS' INDIANA STATUTES, 1952 REP., VOL. 8 PART 1 — INJUNCTIONS IN LABOR DISPUTES — CONTRACTS CONCERNING UNION MEMBERSHIP

40-501. ISSUANCE OF INJUNCTIONS RESTRICTED. — No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act (Sections 40-501 — 40-514) nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act. (Acts 1933, ch. 12, Section 1, p. 28)

40-502. PUBLIC POLICY OF STATE DECLARED. — In the interpretation of this act (Sections 40-501 — 40-514) and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefor, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he

shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted. (Acts 1933, ch. 12, Sec. 2, p. 28)

40-504. INJUNCTIONS AND RESTRAINING ORDERS – WHEN NOT ISSUED. — No court of the state of Indiana shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section three (Section 40-503) of this act. (Acts 1933, ch. 12, Sec. 4, p. 28)

40-506 ACTS OF OFFICERS AND AGENTS OF ASSOCIATIONS – LIABILITY FOR. — No officer or member of any association or organization, participating or interested in a labor dispute, shall be held responsible or liable in any court of the state of

Indiana for the unlawful act of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after knowledge thereof. (Acts 1933, ch. 12, Sec. 6, p. 28)

40-507. INJUNCTIONS — TESTIMONY AND BASIS FOR ISSUING —TEMPORARY RESTRAINING — BOND. — No court of the state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or commiting the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof; * * *

40-508. INJUNCTIVE RELIEF — WHEN DENIED. — No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. (Acts 1933, ch. 12, Sec. 8, p. 2)

40-509. INJUNCTION — FINDING OF FACTS —LIMITATION ON PROHIBITION — No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact ma le and filed by the court as provided herein. (Acts 1933, ch. 12, Sec. 9, p. 28)

40-510. REVIEW BY APPELLATE COURT. — Whenever any court of the state of Indiana shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on the filing the usual bond for cost, forthwith certify as in ordinary cases the record of the case to the Appellate Court for its review. Upon the filing of such records in the Appellate Court, the appeal shall be heard and the temporary injunction order affirmed, modified, or set aside with the greatest possible expedition giving the proceedings precedence over all other matters except older matters of the same character. (Acts 1933, ch. 12, Sec. 10, p. 28)

APPENDIX F

SPECIAL FINDINGS OF FACT

This cause having been submitted on the plaintiff's complaint for injunction in one paragraph and the answer of the defendants in two paragraphs and evidence having been heard on the issues thus formed on November 21, December 5 and December 6, 1962, and both sides having rested, and pursuant to written request of the plaintiff, the court finds the facts to be as follows:

I.

Philip Nagdeman & Sons, Inc., an Indiana corporation, was organized in 1950. It is and has been engaged in the retail men's clothing business on the southeast corner of Michigan Avenue and Fir Street, in East Chicago, Indiana. The corporate stock is owned by two brothers, Irving and Gerald Nagdeman at the same location in 1912. It started as a sole proprietorship, then became a partnership, and, on the retirement of Philip Nagdeman, the business was incorporated and the stock given to the two sons who were active in the business.

II.

The plaintiff firm owns and occupies a two-story building with 25 feet of frontage on Michigan Avenue and 125 feet of frontage on Fir Street. The firm specializes in top grade men's clothing and apparel. The business is largely a cash business. Sixty-five per cent of plaintiff's customers are from cities surrounding East Chicago, such as Gary, Hammond, Whiting, and suburban towns in Lake County. The plaintiff firm advertises extensively in the Hammond Times and Gary Post Tribune, substantial daily newspapers of general circulation in Lake County.

III.

The two stockholders, Irving and Gerald Nagdeman, are active in the business, being physically present every day. They act as salesmen, divide the purchasing duties, handle the advertising and supervise other aspects of the business. In addition to Irving and Gerald Nagdeman, there are two salesmen on the floor, George Williby, a Caucasian, employed in June of 1959, and Manuel Allande, a Caucasian of Spanish descent. The four salesmen, Gerald Nagdeman, Irving Nagdeman, George Williby, and Manuel Allande, have had long and substantial experience in selling men's clothing and apparel. The business does not require further or additional salesmen. The salesmen are paid salaries with bonus at the end of the month depending upon the nature of the firm's profits during the month.

In addition to the four salesmen, the firm employs two seamstresses, Mildred Roby, a Caucasian, and Mrs. Culver, a Negress. Ulysses Bridgeman, a Negro, has been employed for ten years as a window cleaner. Eleanor Sopko handles the bookkeeping. Eve Armenthrout, a Caucasian, works as a part-time seamstress, particularly during and after the January sales. The firm has never discriminated in matters of employment on any basis of creed, race, and/or color, but has maintained an employment policy based exclusively on the merits and abilities of the employees. The plaintiff firm does not have and never has had any dispute or disagreement with any individuals or labor organization or other firms, pertaining to employer- employee relations, wages, hours, working conditions, or other aspects of employer-employee relations.

V.

The two stockholders, Irving and Gerald Nagdeman, have five sons aged twelve to fifteen attending the public schools. The family business has provided

them with necessaries and offers a future to at least some of them.

VI.

Prior to June 4, 1962, plaintiff's gross sales was derived as follows: 28½% from people of Spanish descent (Puerto Ricans, Mexicans, Cubans, etc.), 57½% from Caucasians (Hungarians, Poles, Serbians, etc.) and 14% from people of Negroid or African origin.

VII.

Defendant Fair Share Organization, Inc. was formed on May 11, 1959, as a non-profit organization or association, "To awaken the Negro politically, economically, socially, and civicly." Attorney Hilbert L. Bradley prepared the papers and procured the signatures of sixteen Gary residents as incorporators and directors. Defendant "The Fair Share Organization, Inc." has no assets. Funds are raised through promotional activities with the issuance of membership cards. Approximately $1,000.00 has been raised for legal fees. Defendant Roosevelt V. Haywood, a resident of Gary, is designated as independent chairman of the Fair Share Organization. Defendants William Robinson, Mack King, John Upshaw, Mack Flagg, and James Walker, also of Negroid or African descent and/or origin, are associated with defendant Roosevelt Haywood and Attorney Hilbert L. Bradley in the promotional activities carried on under the name and style of Fair Share Organization, Inc. At all times mentioned herein they have acted jointly and in confederation with each other in performing the acts and engaging in the course of conduct hereinafter specifically described.

VIII.

On or about February 14, 1962, following a conference with Attorney Hilbert L. Bradley, defendants Roosevelt V. Haywood, William Robinson, and Mack

King presented themselves at the Philip Nagdeman & Sons, Inc. store at 3409 Michigan Avenue, East Chicago, and demanded that the firm either engage a Negro salesman on the floor or move the seamstress and/or window washer out in front because Philip Nagdeman & Sons, Inc., "Had no visible Negro out front that could be seen by the Negro buying public and the public in general." The plaintiff firm was given 30 or 45 days to make the adjustment. Thereafter, on or about March 13, 1962, Attorney Hilbert L. Bradley, acting in the capacity of an independent chairman of Fair Share Organization, Inc.., by letter, accused the plaintiff firm of having failed to honor an alleged oral promise or agreement (which was not in fact made) and warned the plaintiff firm that he was about to request his people not to spend their money in the store. Copies of the letter were furnished to two Gary Newspapers, The Crusader Newspaper and the Gary American Newspaper, both publications depending largely on a reading public consisting of members of the Negro race.

IX.

On or about June 4, 1962, groups of pickets began to congregate on the sidewalks surrounding the clothing store entrances. These pickets were acting under the supervision and direction of the defendants, including defendant James Walker as so-called "acting picket captain". Approximately 25 pickets per day would participate, each working for a period of time from a half hour to 45 minutes per picket. No monies were paid to the pickets for their activity. Food and coffee were made available in trucks. The picket roster was a voluntary one enlisted from unemployed persons of Negro or Colored origin in the vicinity who had nothing else to do. When the cold weather came, blockades were installed in lieu of picketing on foot. The pickets photograped prospective customers of Negro descent and halted them for conversational purposes.

X.

In addition to stopping members of the public (of Negro origin) as they were nearing plaintiff's premises, and, by various means, warnings, threats and photographing, attempting to prevent them from freely patronizing plaintiff's business, the defendants and each of them, acting through the pickets, exhibited signs and placards containing false, misleading and damaging information and statements discrediting the plaintiff's business reputation in the eyes of its customers. Among the representations and placards are the following:

(a) **"Join the Fair Share Organization; help fight Communism."** None of the owners or employees of Philip Nagdeman & Sons, Inc., were or are members of the Communist party or allied or communist front organizations. The plaintiff firm and its members were not engaged in communistic activities, nor do they sympathize with Communistic activities. Nevertheless, the signs and placards manifested in connection with the picketing constituted an accusation, in the minds of the public, that Philip Nagdeman & Sons, Inc. was or might be a Communistic organization.

(b) **"Americans, help us to blockade Nagdemans".** The members of the plaintiff firm and its employees are in fact Americans. By soliciting "Americans" to aid in "fighting Communism" by blockading Nagdemans, plaintiff company and its employees were and are falsely accused of being unamerican and communists.

(c) **"Decent Americans, help us to stamp out unlawful discriminatory hiring policies".** Philip Nagdeman & Sons, at no time engaged in any unlawful discriminatory hiring policy. This sign, coupled with other signs, created and does create the inference that Nagdeman & Sons is unamerican and indecent and guilty of unlawful conduct.

(d) **"Don't spend your money where you can't work as a salesman"**. This representation falsely accuses the plaintiff firm of being unwilling to hire a salesman. There is no evidence that any person of Negro origin ever applied for a job as a salesman at Philip Nagdeman & Sons, Inc.

(e) **"Nagdeman Brothers has threatened to destroy F.S.O."** The Nagdeman Brothers did not threaten to destroy F.S.O. The public in East Chicago never heard of "F.S.O." until its existence was made known by the defendants at, near, and around the Philip Nagdeman store.

XI.

As a direct and proximate result of the pickets congregating on the sidewalks at or near and in front of plaintiff's store, the threats, intimidations, photographing, and solicitations, and the false and misleading signs, placards and blockades, plaintiff's business has suffered substantial damage and it will continue unless the acts and conduct of the defendants are enjoined.

CONCLUSIONS OF LAW

The court having found the facts specially herein now concludes the law applicable to said facts to be as follows:

I.

The law is with the plaintiff upon its complaint and against the defendants upon their answer; and the plaintiff is entitled to the relief prayed for in the complaint.

II.

The plaintiff is entitled to injunctive relief against the defendants, and each of them, restraining and enjoining them, and each of them, and any and all per-

sons acting by, through, or at the instance of said defendants, or any one of them, from further committing any of the acts found or engaging in the course of conduct set out in the findings, including picketing on or about the premises of the plaintiff at the southeast corner of Michigan & Fir Street, East Chicago, soliciting patrons of plaintiff, photographing patrons, blockading the store, and exhibiting placards, signs, and/or cards.

III.

Plaintiff is entitled to recover damages of and from the defendants for the losses suffered.

IV.

Plaintiff is entitled to recover its costs.

All of which the court now concludes the law to be this 21st day of March, 1963.

NEWELL A. LAMB
Judge, Newton Circuit Court

DECREE

The Court, having this day entered its special findings of fact and conclusions of law, now determines as follows:

IT IS NOW ORDERED, ADJUDGED, AND DECREED that the defendants, and each of them, and any and all persons acting by, through, or at the instance of said defendants, and all persons with knowledge of this decree, are separately and severally permanently enjoined and restrained from:

(a) Picketing, congregating in front of, or blockading the premises of the plaintiff firm at the southeast corner of Michigan Avenue & Fir Street in East

Chicago, Indiana, commonly known as 3409 Michigan Avenue;

(b) Soliciting, accosting, and/or photographing patrons of the plaintiff company store, and/or in any way attempting to influence or induce said patrons from entering the store; and

(c) From displaying, exhibiting, posting or in other ways advertising, representing, or inferring to the public by means of signs, cards, or other advertising devices that the plaintiff, Philip Nagdeman & Sons, Inc. is engaged in Communistic practices, discriminatory hiring policies, is unamerican, or that it either has or will attempt to destroy F.S.O., or any signs or slogans similar to the same.

IT IS ORDERED, ADJUDGED, AND DECREED FURTHER that the plaintiff have and recover of and from the defendants, and each of them, the sum of $10,000.00 and that it recover its costs, taxed at $37.85.

ALL OF WHICH IS ORDERED, ADJUDGED, AND DECREED by the Court this 21st day of March, 1963.

NEWELL A. LAMB
Judge, Newton Circuit Court

APPENDIX G

FAIR SHARE ORGANIZATION, HILBERT L. BRADLEY, JULIUS JAMES, WILLIE BYRD, JR., DAVID C. MITCHELL, MAURICE PRESTON, individually and as representatives of all members of said defendant, FAIR SHARE ORGANIZATION,

APPELLANTS,

V.

KROGER COMPANY, Local 1460 Retail Clerks International Association, AFL CIO,

APPELLEES

NO. 29792

Supreme Court of Indiana

March 23, 1960

Rehearing Denied April 27, 1960

Injunction suit. The Circuit Court, Newton County, Newell A. Lamb, J., granted a temporary injunction against picketing which court found was designed to force plaintiff to change its employment practices and engage in selective hiring of Negro employees based on proportion of Negro customers who patronize its stores even if that required plaintiff to discharge or transfer competent white employees and replace them with Negroes, and defendants' appeal was transferred by the Appellate Court. The Supreme Court, Per Curiam, held that case grew out of a labor dispute, and that appeal lay to Appellate Court rather than to Supreme Court.

Cause ordered transferred back to Appellate Court.

PER CURIAM

This appeal from the granting of a temporary injunction by the court below was taken by appellant to the Appellate Court pursuant to Burns' Sec. 40-510 (1952 Replacement). (1) The Appellate Court, upon appellee's motion, transferred the cause to this court on the theory that the case did not involve or grow out of a labor dispute and that an appeal from the granting of a temporary injunction under Burns' Sec. 2-214 (1946 Replacement) (2) should be taken from the trial court to the Supreme Court.

We believe the finding of facts entered by the trial court shows that this cause involved or grew out of a labor dispute as defined in Burns' Sec. 40-513 (1952 Replacement) (3). The finding was in part as follows:

> "On and after September 19, 1958, the defendants picketed and caused to be picketed one or more of said three stores for purpose of forcing plaintiff to change its employment practices; and for the purpose of forcing plaintiff to engage in selective hiring of Negro employees based on the proportion of Negro customers who patronize its stores, which would result in requiring the plaintiff to discharge competent white employees and replace them with Negroes; * * *."

We believe the lower court's further statement that:

> "There is no labor dispute existing between the plaintiff and its employees or the unions which lawfully, properly and exclusively represent them in collective bargaining"

is ambiguous but that under the facts found by the court heretofore set out, it could only be concluded that the case involved or grew out of a labor dispute as defined in the Indiana statutes. See: New Negro

Alliance v. Grocery Co., 1938, 303 U. S. 552, 58 S. Ct. 703, 82 L. ed. 1012, involving a similar statute.

The cause is now ordered transferred back to the Appellate Court.

ACHOR, J., not participating because of illness.

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1. Acts 1933, ch. 12, Sec. 10, p. 28
2. Acts 1901, ch. 247, Sec. 9, p. 565; 1907, ch. 148, Sec. 1, p. 237; 1915, ch. 76, Sec. 1, p. 149; 1925, ch. 201, Sec. 1, p. 487
3. Acts 1933, ch. 12, Sec. 13, p. 28

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 106

FAIR SHARE ORGANIZATION, INC., ET AL,

Petitioners,

vs.

PHILIP NAGDEMAN & SONS, INC.,

Respondent.

Respondent's Brief In Opposition To Petition For A Writ Of Certiorari To The Appellate Court For The State Of Indiana.

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JURISDICTION.

Although the petitioners state that they are invoking this Court's jurisdiction under 28 U.S.C. §1254(3), they are, in fact, attempting to invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

Under this section of the United States Code, it is respectfully submitted that this Honorable Court has no jurisdiction to issue a writ of certiorari to the Appellate Court of Indiana. Although the petitioners attempted to

raise a constitutional question in the Indiana Appellate Court by their Brief, the Appellate Court did not express an opinion on the constitutional question but, rather, decided the case solely on a state procedural issue. Therefore, the decision of the Indiana Appellate Court rested solely upon a state ground, and under well-established precedents, this Court should not issue a writ of certiorari in the case at bar.

QUESTION PRESENTED.

Whether this Court will issue a writ of certiorari to the Indiana Appellate Court, where the decision of the Appellate Court rested solely upon a state procedural ground, the appeal being affirmed, without any consideration as to the merits of the appeal, because of the failure of the appellants (petitioners here) to follow well-established Indiana appellate procedure.

STATEMENT OF FACTS.

The present litigation was commenced by the filing of a complaint by the respondent, Philip Nagdeman & Sons, Inc., against the Fair Share Organization, Inc. and some individual members for an injunction and damages for tortious interference to the respondent's business propert.. The cause was tried in the Newton Circuit Court and on March 21, 1963, the trial judge issued a permanent injunction restraining the petitioners from picketing the respondent's store of business and granted a damage judgment for $10,000.00. (The petitioners' statement on page 1 of their Petition that the judgment was for $70,000.00 is incorrect, as demonstrated by the trial court's decree printed at pages 25a-26a of the Petition.)

Although the petitioners did raise a question as to their constitutional right to picket under the 14th Amendment by their answer to the respondent's complaint, the trial court, nevertheless, granted the injunction upon finding the following special facts (printed at pages 23a-24a of the Petition):

"X.

In addition to stopping members of the public (of Negro origin) as they were nearing plantiff's premises, and, by various means, warnings, threats and photographing, attempting to prevent them from freely patronizing plaintiff's business, the defendants and each of them, acting through the pickets, exhibited signs and placards containing false, misleading and damaging information and statements discrediting the plaintiff's business reputation in the eyes of its cus-

tomers. Among the representations and placards are the following:

(a) **'Join the Fair Share Organization; help fight Communism.'** None of the owners or employees of Philip Nagdeman & Sons, Inc., were or are members of the Communist party or allied or communist front organizations. The plaintiff firm and its members were not engaged in communistic activities, nor do they sympathize with Communistic activities. Nevertheless, the signs and placards manifested in connection with the picketing constituted an accusation, in the minds of the public, that Philip Nagdeman & Sons, Inc. was or might be a Communistic organization.

(b) **'Americans, help us to blockade Nagdemans'.** The members of the plaintiff firm and its employees are in fact Americans. By soliciting 'Americans' to aid in 'fighting Communism' by blockading Nagdemans, plaintiff company and its employees were and are falsely accused of being unAmerican and communists.

(c) **'Decent Americans, help us to stamp out unlawful discriminatory hiring policies'.** Philip Nagdeman & Sons, at no time engaged in any unlawful discriminatory hiring policy. This sign, coupled with other signs, created and does create the inference that Nagdeman & Sons is unAmerican and indecent and guilty of unlawful conduct.

(d) **'Don't spend your money where you can't work as a salesman'.** This representation falsely accuses the plaintiff firm of being unwilling to hire a salesman. There is no evidence that any person of Negro origin ever applied for a job as a salesman at Philip Nagdeman & Sons, Inc.

(e) **'Nagdeman Brothers has threatened to destroy F.S.O.'** The Nagdeman Brothers did not threaten to destroy F.S.O. The public in East Chicago never heard of 'F.S.O.' until its existence was made known by the defendants at, near, and around the Philip Nagdeman store."

"XI.

As a direct and proximate result of the pickets congregating on the sidewalks at or near and in front of plaintiff's store, the threats, intimidations, photographing, and solicitations, and the false and misleading signs, placards and blockades, plaintiff's business has suffered substantial damage and it will continue unless the acts and conduct of the defendants are enjoined."

In short, the trial court found that the petitioners, under the guise of free speech picketing, were guilty of threatening and intimidating potential customers of the respondent as well as guilty of carrying pickets which contained false, misleading, and damaging information, thereby irreparably damaging the respondent's business reputation.

Under Indiana law, a losing party in the trial court is given 30 days by statute, Burns' Section 2-2403, for the filing of a motion for new trial. Since the judgment of the Newton Circuit Court was entered on March 21, 1963, the time for the filing of a motion for new trial expired for the petitioners on April 20, 1963. No such motion was filed by the petitioners.

Instead, they attempted to raise alleged errors on the part of the trial court by means of a petition for a writ of mandate in the Indiana Supreme Court. The Supreme Court denied the petitioners' petition for a writ of mandate on the sole ground that the errors attempted to be raised could only be considered on a direct appeal. *State of Indiana*

ex rel. Fair Share Organization, Inc., et al. v. *Newton Circuit Court*, (1963) ..... Ind. ....., 191 N.E. 2d 1, printed at pages 6a to 10a of the Petition.

The petitioners then docketed an appeal with the Indiana Appellate Court, by filing their record as well as their Assignment of Errors. Petitioners' Assignment of Errors listed seven specifications of error which allegedly were committed by the trial court. The seven specifications are printed at page 2a of the Petition, as part of the Appellate Court opinion. As can be seen, all of the alleged errors were errors which occurred prior to the time required by statute for the filing of a motion for new trial.

Indiana Supreme Court Rule 2-6 specifically provides for the appellate procedure to be followed in raising errors allegedly committed by the trial court prior to the time required by statute for the filing of a motion for new trial. Supreme Court Rule 2-6 provides in pertinent part:

> "In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion *shall* be filed and *shall* separately specify as grounds therefor *each* error relied upon *however and whenever arising up to the time of filing of such motion*, and an assignment of error on appeal to the effect that the trial court erred in overruling said motion *shall* be the *only* means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently. Adopted as amended June 28, 1960. Effective September 1, 1960, and shall apply only to cases filed on or after such effective date" (Emphasis added.)

Therefore, under this clear and explicit rule, it is necessary for a losing party in the trial court, if he intends to

raise errors allegedly committed by the trial court prior to the time required for the filing of a motion for new trial, to raise said errors by means of such a motion. In short, any alleged error committed by the trial court during the course of the trial must be first raised by a motion for new trial; they cannot be raised by independent assignment on appeal.

On the basis of this rule, the respondent filed a motion in the Indiana Appellate Court to "dismiss or, in the alternative, to affirm the judgment below". The Indiana Appellate Court, in an opinion dated October 22, 1963, affirmed the judgment of the Newton Circuit Court, solely on the ground that the appellants, petitioners here, did not comply with Supreme Court Rule 2-6 by first raising the alleged errors committed by the trial court by means of a motion for new trial. As can be seen from a cursory reading of the Appellate Court opinion, printed at pages 1a-5a of the Petition, the Court did not consider the appeal on the merits, but affirmed the trial court's judgment solely because of the appellants' failure to follow the well-established appellate procedure provided by Supreme Court Rule 2-6.

Therefore, the Appellate Court did not consider any constitutional question, although a question as to the petitioners' right of free speech was raised in their Brief. As stated by the Appellate Court: "Appellee urges, in a motion to dismiss or, in the alternative, to affirm, that since no motion for new trial was filed, *no question is presented in this appeal. With this contention we must agree.*" The Appellate Court later stated: "It becomes apparent that Appellants have failed to comply with the provisions of said rule. [Rule 2-6] Therefore, appellants' assignment of error presents *no justiciable question* to this Court and the judgment of the trial court is affirmed." (Emphasis added.)

ARGUMENT.

I.

THIS HONORABLE COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA, SINCE THE DECISION OF THE APPELLATE COURT DID NOT DECIDE ANY FEDERAL QUESTION BUT RESTED SOLELY AND ENTIRELY UPON A GROUND OF STATE APPELLATE PROCEDURE.

It is a well established and familiar principle that this Court will decline to review a state court judgment which rests on an independent and adequate state ground, notwithstanding the co-presence of federal grounds.

Fay v. *Noia* (1963), 372 U.S. 391, 83 S. Ct. 822;
NAACP v. *Alabama ex rel. Patterson* (1958), 357 U.S. 449, 78 S. Ct. 1163;
Fox Film Corporation v. *Muller* (1935), 296 U.S. 207, 56 S. Ct. 183.

A fortiori, this principle is applicable to the present case, where the decision was not based in part upon a federal ground, but rested solely and entirely upon a state ground of appellate court procedure. As stated by this Court in *Herb* v. *Pitcairn* (1945), 324 U.S. 117, 65 S. Ct. 459, which involved the question of an adequate state procedural ground:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.
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> • • • • •
>
> "*Murdock* v. *Memphis*, 20 Wall. 590, 636, 22 L. Ed. 429; *Berea College* v. *Kentucky*, 211 U.S. 45, 53, 29

S. Ct. 33, 34, 55 L. Ed. 81; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644; *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion. If the Illinois court means to hold that the city courts could not adjudge, transfer, or begin these cases and that no case is pending in its courts at the present time, it is manifest that no view we might express of the federal Act would require its courts to proceed to the trial of these actions." (At p. 463)

This Court's recent decision in *Wolfe* v. *North Carolina* (1960), 364 U.S. 177, 80 S. Ct. 1482 is precisely in point. There, the North Carolina Supreme Court did not reach the merits of the constitutional question duly raised by the parties seeking a writ of certiorari. The North Carolina Supreme Court affirmed the trial court's judgment on the sole ground that the record before it did not present the constitutional questions attempted to be raised. In short, the Court affirmed the trial court's judgment on a state procedural ground.

This Court dismissed the attempted appeal and/or petition for writ of certiorari in *Wolfe*, since the North Carolina Supreme Court decision rested solely upon a state procedural ground. In so holding, this Court stated:

"The judgment before us for review is the judgment which the Supreme Court of North Carolina made *on the record before it, not* the action of the state trial court. *Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.* [Case citations.]

'[*W*]*hen as here there can be no pretence that the* [state] *Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.*' *Nickel* v. *Cole*, 256 U.S. 222, 225, 41 S. Ct. 467, 468, 65 L. Ed. 900." (At p. 1492; emphasis added.)

* * * * *

"*The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.*" (At p. 1493, emphasis added.)

II.

THE INDIANA APPELLATE COURT DECISION WAS BASED UPON A SOUND AND REASONABLE RULE OF INDIANA APPELLATE COURT PRACTICE, APPLICABLE TO ALL APPEALS BEFORE THAT COURT.

Petitioners infer at page 11 of their Petition that the Indiana Appellate Court's decision was based upon a "regulatory measure" which was "employed in purpose or effect to stifle, penalize or curb the exercise of First Amendment rights". Cited are this Court's opinions in *NAACP* v. *Louisiana* (1961), 366 U.S. 293, 81A S. Ct. 1333; *American Communications Association* v. *Douds* (1950), 339 U.S. 382, 70 S. Ct. 674; *United States* v. *Rumely* (1953), 345 U.S. 41, 73 S. Ct. 543; *Shelton* v. *Tucker* (1960), 364 U.S. 479, 81 S. Ct. 247; *Bates* v. *Little Rock* (1960), 361 U.S. 516, 80 S. Ct. 412.

It is respectfully submitted that only a cursory reading of the above cited cases is necessary to realize their irrelevancy to the problem presented by the case at bar. The state and federal statutes involved in these cases were directly concerned with First Amendment rights. For instance, in *NAACP* v. *Louisiana, supra*, a state law required the officers of the NAACP to annually file an affidavit that none of the officers were members of a communist, communist front, or subversive organization.

In the present case, the state law involved, Supreme Court Rule 2-6, does *not* directly or indirectly deal with or have an effect upon First Amendment rights. This Rule is simply a rule of appellate court practice in the State of Indiana, which provides for an appellate procedure which is "no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or

general law". (346 U.S. at 195) As such, it is obvious that the Appellate Court decision, based upon the explicit and clear mandate of Rule 2-6, is not in conflict with the decisions of this Court cited by the petitioners.

Also, the intimation by petitioners at page 9 of their Petition that Supreme Court Rule 2-6 has been applied unequally in a number of cases is totally without foundation. The present Supreme Court Rule 2-6 was amended on June 28, 1960, to become effective on September 1, 1960. Prior to its amendment, many errors could be raised independently on appeal without the necessity of first raising them by means of a motion for a new trial. But since its amendment, the rule is crystal clear that only errors which have arisen subsequent to the filing of a motion for new trial can be raised independently on appeal. All others must be first raised by means of a motion for new trial and then by assigning on appeal as error the overruling of the motion for new trial.

Petitioners cite a number of cases at page 9 in which they allege that independent assignments on appeal—alleging as error conclusions of law entered by trial courts—were considered, notwithstanding Rule 2-6. However, the *Wyatt* and *Sykes* cases were both decided prior to the date Rule 2-6 was even amended. Secondly, petitioners apparently overlook the fact that Rule 2-6 did not become effective until September 1, 1960, and that the Rule states that it "shall apply only to cases filed on or after such effective date." *Superior Trailer*, decided November 3, 1960, was obviously filed prior to the effective date of Rule 2-6.

The *Harshman* case and the *Triplett* case are clearly distinguishable. In *Triplett*, the Appellate Court did hold that no question was presented by the independent assignment because of a failure to present a proper argument, and in *Harshman*, the appellee did not object to the independent assignment of error by the appellants, which the respondent did do in the case at bar by its motion to dismiss.

Finally, in this context, it should be noted that the Supreme Court of Indiana has recently had an opportunity to decide the precise question which the Appellate Court decided in the case at bar and has explicitly held that the Appellate Court's ruling is correct and that a failure to comply with Rule 2-6 requires a dismissal of the appeal or an affirmance without a consideration of the merits. In *Payne* v. *State*, (1962) ..... Ind. ....., 186 N.E. 2d 9, the Supreme Court held that where the appellant failed to assign as error the overruling of a motion for a new trial and attempted, instead, to assign the alleged errors independently on appeal, the appeal would be dismissed. In so holding, the Court stated:

> "Items of alleged error contained in a motion for a new trial present no question on appeal if assigned separately as errors in the Assignment of Errors. Such alleged errors are correctly presented only by the overruling of a motion for a new trial." (At p. 9)

Therefore, it is obvious that there is no substance whatsoever in the petitioners' intimation that Supreme Court Rule 2-6 has been applied unequally in the case at bar, thereby depriving petitioners of a decision on their constitutional question.

III.

THERE IS NO MERIT TO THE PETITIONERS' ARGUMENT THAT THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI FOR THE PURPOSE OF DETERMINING WHETHER OR NOT A LABOR DISPUTE WAS INVOLVED.

The second part of petitioners' argument is completely devoid of legal merit for a number of reasons. First, the question as to whether or not there existed a labor dispute under the Indiana Anti-Injunction Statute, being Burns' Section 40-501, et seq., is not a federal question. Secondly, even if it were a federal question, the Indiana Appellate Court decision is based solely upon an independent and adequate state ground.

Finally, there is, in point of fact, no question under Indiana law as to whether or not a labor dispute was involved under the facts presented by the case at bar. The Supreme Court of Indiana has held in *Fair Share Organization, Inc.* v. *Kroger Company*, (1960) 240 Ind. 461, 165 N.E. 2d 606, (printed at pages 27a-29a of the Petition) that picketing by the petitioners here of a store of the Kroger Company "involved or grew out of a labor dispute as defined in the Indiana statutes." As authority for this ruling, the Indiana Supreme Court expressly relied upon this Court's decision in *New Negro Alliance* v. *Sanitary Grocery Company, Inc.*, (1938) 303 U.S. 552, 58 Sup. Ct. 703. Hence, the Indiana courts have already held that a labor dispute exists under the facts presented by the instant case.

CONCLUSION.

A reading of the opinion of the Indiana Appellate Court, printed at pages 1a-5a of the Petition, demonstrates that the decision was based solely upon a state procedural ground. As such, no federal question was decided; rather the decision rests solely upon an independent and adequate state ground.

Wherefore, respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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